1237.

SUPREME COURT OF THE UNITED STATES.

No. 137.

HORATIO N. SLATER, PL'FF IN ERROR,

vs.

CHARLES EMERSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	3	2
Declaration	6	3
Plea and issue	14	5
Verdict	15	6
Judgment	15	6
Bill of exceptions	16	6
Clerk's certificate	34	12

GIDEON, printer.

Writ of Error.

UNITED STATES, *ss:*

[SEAL.] The President of the United States, to the Judges of the Circuit Court holden in and for the district of Massachusetts, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between Charles Emerson, plaintiff, and Horatio N. Slater, defendant, in a plea of the case, a manifest error has intervened, to the great damage of the said Slater, as in his complaint has been stated: And as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the National Government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, esquire, chief justice of the said Supreme Court, at Washington aforesaid, this fourteenth day of November, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the eightieth.

H. W. FULLER, *Clerk.*

Allowed by B. R. CURTIS,
Asso. Jus. S. C. U. S.

UNITED STATES OF AMERICA,
District court of the U. S., Mass. dist.

I, Henry W. Fuller, clerk of the cir. court of the United States, Massachusetts district, do hereby make return of this writ of error, and annex hereto, and return herewith, a true copy of *of* the entire record, and of all proceedings in the cause or suit, Charles Emerson against Horatio N. Slater, wherein judgment was rendered in the said circuit court of the U. S. I also annex the citation issued and returned in the case, and do certify that a copy of this writ of error was, on the day of the date of this writ, lodged in the clerk's office of said circuit court for the adverse party.

In testimony whereof I have hereunto set my hand and [SEAL.] the seal of said court, this first day of December, A. D. 1855.

H. W. FULLER, *Clerk.*

Citation.

UNITED STATES OF AMERICA,
Mass. dist., ss:

CHARLES EMERSON
vs.
HORATIO N. SLATER.

To Charles Emerson, of Boston, in said district, gentleman, greeting:

Whereas, the circuit court of the United States for the first circuit and district of Massachusetts, on the fourteenth day of November, A. D. 1855, rendered a final judgment in a certain cause then depending therein, between Charles Emerson, as plaintiff, and Horatio N. Slater, as defendant; on which said judgment the said Slater hath caused a writ of error to be sued out from the said circuit court, returnable at the next term of the Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the first Monday of December next; and the said Slater hath filed in said court security to prosecute his said suit, as required by law; and thereupon the said writ hath been duly allowed, the court deeming it reasonable to allow the same.

Now, therefore, you are hereby notified of the issuing and allowance of the said writ of error, and are hereby cited to appear, if you see cause, at the said Supreme Court of the United States, next to be holden at Washington aforesaid, on the first Monday of December next, to make answer thereto.

[SEAL.] Given under my hand and seal, this fourteenth day of November, A. D. one thousand eight hundred and fifty-five.

B. R. CURTIS,
Asso. Jus. S. C. U. S.

UNITED STATES OF AMERICA,
Mass. dist., ss:

BOSTON, *November* 15, 1855.

I certify that I have notified the within named Emerson, by giving him in hand a true and attested copy hereof.

WATSON FREEMAN,
U. S. Marshal,
By F. WARREN, *Dep.*

Ser. & tr.	$2 06
Cop.	1 00
	$3 06

UNITED STATES OF AMERICA,
Massachusetts district, ss:

At a circuit court of the United States, for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and fifty-five.

Before the honorable Benj'n R. Curtis, associate justice, and the honorable Peleg Sprague, district judge.

CHARLES EMERSON, of Boston, in said district of Massachusetts, and a citizen of said State of Massachusetts, gentleman, plaintiff,

versus

HORATIO N. SLATER, of Providence, in the district of Rhode Island, and a citizen of said State of Rhode Island, gentleman, defendant.

In a plea on the case, for that, whereas, the defendant at Boston in said district of Massachusetts, on the fourteenth day of November last, in consideration of the promise and agreement of the plaintiff to complete all the bridge-work which the said plaintiff had contracted to do for the Boston and New York Central Railroad Company, by the first day of December the next, promised and agreed to and with the plaintiff, that upon the completion of the said bridges, and when the rails for one track should be laid to the foot of Summer street, in said Boston, from Dedham, in the county of Norfolk, he, the said defendant, would give to him, the said plaintiff, his said defendant's five notes for two thousand dollars each, to bear date at the time the same should be given, and to be made payable in six months from their date to the plaintiff or his order. And the plaintiff says that he performed and completed all the bridge-work that he had contracted to do for the said Boston and New York Central Railroad Company, ready for laying down the iron rails for one track, by the first day of December last past, and that the said bridges were completed and the rails for one track were laid to the foot of Summer street, in Boston, from Dedham, on the tenth day of December now last past. Yet the said defendant, though requested, to wit, on the first day of January last past, did not give to the plaintiff his, said defendant's, five notes for two thousand dollars each, payable in six months from date to the said plaintiff or his order, or either of them, but neglected and refused, and still refuses so to do.

And the plaintiff further says, that at said Boston, on the fourteenth day of November now last past, the defendant, by his agreement in writing of that date, in consideration of the promise and agreement of the plaintiff to complete all the bridge-work to be done by the plaintiff for the Boston and New York Central Railroad Company, ready for laying down the iron rails for one track, by the first of December then

next, agreed with the said plaintiff to pay him within two days from the said date the sum of forty-four hundred dollars in cash; and further that he, the said defendant, would, on the completion of said bridges, and when the rails for one track should be laid to the foot of Summer street in said Boston from Dedham, give to the plaintiff his, the said defendant's, five notes for two thousand dollars each, dated when said notes should be given, and payable in six months from their dates to the said plaintiff or his order. And the plaintiff says, that he completed the said bridges, and that the rails for one track were laid to the foot of Summer street, in said Boston, from Dedham, on the twentieth day of December now last past; yet the said defendant, though requested, to wit, on the first day of January last past, did not give to the plaintiff his, the said defendant's, five notes for two thousand dollars each, payable to the plaintiff or his order, in six months from their date, or either of them, but neglected and refused, and still refuses so to do.

And the plaintiff further says, that at said Boston, on the fourteenth day of November now last past, the defendant, by his agreement in writing of that date, in consideration of the promises and agreements of the plaintiff in said agreement contained, promised and agreed to and with the plaintiff, that, upon the completion of the bridges upon the Boston and New York Central Railroad Company, which the said plaintiff was then constructing, and when the rails for one track should be laid to the foot of Summer street in said Boston, from Dedham, promised the plaintiff to give him the said defendant's five notes for two thousand dollars each, to be dated when the same were given, and payable in six months from date, to the plaintiff or his order. And the plaintiff says, that the said bridges were completed, and the rails for one track were laid to the foot of Summer street, in Boston aforesaid, from Dedham aforesaid, on the twentieth day of December last past; yet, the defendant, though requested, to wit, on the first day of January last past, did not give the plaintiff his, the said defendant's, five notes for two thousand dollars each as aforesaid, or either of them, but neglected and refused, and still refuses and neglects so to do.

In a plea of the case, for that the said defendant, on the day of the purchase of this writ, being indebted to the plaintiff in fifteen thousand dollars, for goods sold and delivered by the plaintiff to the defendant; and in the same amount for work done, and materials for the same provided by the plaintiff for the defendant, at his request; and in the same amount for money lent by the plaintiff to the defendant; and in the same amount for money received by the defendant to the use of the plaintiff; and in the same amount for money paid by the plaintiff for the use of the defendant, at his request; and in the same amount for money due from the defendant to the plaintiff, for interest of money before then due and owing from the defendant to the plaintiff, and by the plaintiff forborne to the defendant, at the defendant's request, for a long time before then elapsed; and in the further sum of dollars and cents, according to the account annexed, in con-

sideration thereof promised to pay the same amount to the plaintiff on demand, yet he has not paid the same, to the damage of the said plaintiff, as he says, the sum of fifteen thousand dollars.

The following additional count was, by consent of defendant's attorney, filed in the clerk's office of this court, on the 8th October, 1855, viz.:

And the plaintiff further says, that the defendant, at said Boston, on the fourteenth day of November last, in consideration of the promise and agreement of the plaintiff to complete all the bridge-work which the said plaintiff had contracted to do for the Boston and New York Central Railroad Company, ready for laying down the iron rails for one track, by the first day of December then next, promised and agreed to and with the plaintiff, that he would pay him, within two days from the said fourteenth day of November, the sum of forty-four hundred dollars in cash, and further, that he, the said defendant, would, on the completion of the said bridges, and when the rails for one track should be laid to the foot of Summer street in said Boston, from Dedham, in the county of Norfolk, give to the plaintiff his said defendant's five notes for two thousand dollars each, to bear date at the time when the same should be given, and to be made payable in six months from their date, to the plaintiff or his order. And the plaintiff says, that the defendant waived the performance of said agreement by said plaintiff to complete said bridge-work by the said first day of December, and extended the time for the completion of said bridge-work, from the said first day of December to the twentieth day of said December. And the plaintiff says, that he performed and completed all the bridge-work that he had contracted to do, for the Boston and New York Central Railroad Company, on the fifteenth day of December last, and that the rails for one track were laid to the foot of Summer street in said Boston, from said Dedham, on the twentieth day of said December. Yet the said defendant, though requested, to wit, on the first day of January last past, did not give the plaintiff his, the said defendant's, five promissory notes of two thousand dollars each, payable to the plaintiff or his order in six months from their date, or either of them; but neglected and refused, and still neglects and refuses so to do.

This action was entered at the May term, A. D. 1855 of this court, and was thence continued to this present term, when the following plea and issue was filed, viz.:

CHARLES EMERSON
vs.
HORATIO N. SLATER.

And the said defendant, by his attorneys, "Smith and Bates," comes and defends the wrong and injury, when, &c., and says, he did not undertake or promise, in manner or form, as the plaintiff hath in the several counts in his declaration complained against him, and of this

he puts himself upon the country; wherefore, he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action against him.

By his Attorneys, SMITH & BATES.

And as to the above plea pleaded by the defendant, the plaintiff doth the like.

HUTCHINS & WHEELER,
For Plaintiff.

Issue being thus joined, the cause, after a full hearing, was committed to a jury sworn according to law to try the same; who, after hearing all matters and things concerning the same, returned their verdict therein, and upon oath said: "That the defendant did promise, in manner and form as the plaintiff hath declared against him; and assess damages in the sum of ten thousand one hundred and ninety-nine dollars.

Thereupon, it is considered by the court, that the said Charles Emerson do recover against the said Horatio N. Slater the sum of ten thousand one hundred and ninety-nine dollars damages, and also his costs of said suit, taxed at .

Upon the trial of said cause, after the evidence was closed on both sides, and before the issue was submitted to the jury, the plaintiff filed his bill of exceptions, which was allowed by the court, and is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Massachusetts district.

October Term, 1855.

CHARLES EMERSON }
vs.
HORATIO N. SLATER. }

Bill of Exceptions.

Be it remembered, that at a term of a circuit court of the United States for the first circuit, holden at Boston, within and for the district of Massachusetts, on the fifteenth day of October, eighteen hundred and fifty-five, by the honorable Benjamin R. Curtis, circuit judge, and the honorable Peleg Sprague, district judge, came Charles Emerson, of Boston, in said district, and by an action of special assumpsit declared against Horatio N. Slater, of Providence, in the district of Rhode Island, and a citizen of the State of Rhode Island, as by the writ and declaration of record will appear; to which the defendant pleaded the general issue which was joined, and thereupon came on for trial, before the said circuit court, at said October term, before a jury empannelled for that purpose; and the said plaintiff, then and there, to maintain and prove the issue on his part, submitted to the court and jury the following documents and oral testimony, to wit:

Agreement between Plaintiff and Defendant.

This agreement, made this fourteenth day of November, A. D. 1854, by and between Charles Emerson, of Boston, Massachusetts, and H. N. Slater, of Providence, Rhode Island, witnesseth: That the said Emerson, in consideration of the agreements of said Slater, hereinafter contained, and of one dollar to him paid, the receipt whereof is hereby acknowledged, covenants and agrees with said Slater, that he, the said Emerson, will complete all the bridge-work to be done by him for the Boston and New York Central Railroad Company, ready for laying down the iron rails for one track, by the first day of December next.

And the said Slater, in consideration of the premises, hereby agrees with said Emerson that he will pay him, within two days from the date hereof, the sum of forty-four hundred dollars in cash; and the said Slater further agrees, that he will give to the said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street in Boston, from Dedham, his, said Slater's, five notes for two (2) thousand dollars each, dated when said notes are given, as above provided, and payable in six months from their date, to said Emerson or his order.

Said notes, when paid, are to be applied towards the indebtedness of said Boston and New York Central Railroad Company, to said Emerson.

It being understood that this agreement is in no way to affect any contract of said Emerson with said company, or any action now pending between them.

CHARLES EMERSON,
H. N. SLATER.

The execution of which agreement was admitted, and it was also admitted by both parties, that the work upon the bridges, in said agreement set forth, was completed, ready for laying down the iron rails for one track, about the middle of December, A. D. 1854, and that the rails were laid to the foot of Summer street in Boston, from Dedham, about the last of December, 1854.

Hamilton Willis called by Plaintiff.

Defendant was president of the Boston and New York Central Railroad Company, and a stockholder and a bondholder in the same. The corporation failed, on or about July 2nd, 1854. The company was then indebted to the plaintiff, and did not pay him. In the second week of July, there was a crisis in the affairs of the company, and Emerson suspended his work, so far as regarded new outlays. In August, a new arrangement was made, and he went on till first or second week in November, and then he kept a force on great bridges, just enough to keep possession of the work, and would not surrender them; I then made effort to get bridges completed. The question was, how much Emerson would take; company owed Emerson some ten to

fifteen thousand dollars. The company was then insolvent, as respected meeting their engagements.

And the said defendant, then and there to maintain and prove the issue on his part, submitted to the court and jury the following documents and oral testimony, to wit:

Contract between Boston and New York Central Railroad Company and Charles Emerson.

Memorandum of an agreement made and concluded this seventeenth day of December, one thousand eight hundred and fifty-three, by and between the Boston and New York Central Railroad Company, a corporation duly established by the laws of the commonwealth of Massachusetts, party of the first part, and Charles Emerson, of Boston, in the county of Suffolk, and commonwealth aforesaid, party of the second part, witnesseth:

That for and in consideration of the covenants and agreements of the party of the first part hereinafter mentioned, the said party of the second part agrees to and with the said party of the first part, to build and complete, sufficient for the passage of an engine over the same, on or before the first day of May next, all the bridging as now laid out and determined upon, by the engineer of said railroad, from the wharf near the foot of Summer street in said Boston, to south Boston, and from south Boston, across the south bay, so called, to the Dorchester shore, in Dorchester, in the county of Norfolk, in the manner and with the materials hereinafter described, and to finally complete the same, and everything hereinafter specified, to the satisfaction and acceptance of the State commissioner and the engineer of said railroad, as soon after the said first day of May next, as may be.

From the said wharf to the easterly line of the commissioners, across from point channel, so called; this bridge to be built eight hundred feet in length, with oak piles six in a bent or pier, with spur-shores thoroughly driven; piers to be eighteen feet from centre to centre of caps; caps to be 14 × 14 inches; tracks, stringers, and bolsters 14 × 14 inches; top-stringers, for holding mud and gravel, 10 × 10 inches; all of the rest white pine. Covering to be 7 inches thick, piers to be girdered and braced with oak, similar to the Fitchburg R. R. bridge, across Charles river; covered with 12 inches of marsh mud and 8 inches of good clean gravel, with cast-iron scruppers put in to let off the surface water; railing to be put on the sides of the bridge, and the railing to be planed and finished thoroughly, in a workmanlike manner, and painted.

Two draw piers, one hundred and fifty feet each in length, and not less than eighteen feet in width, to be built of oak piles, and caps of white pine, to be planked down to low water-mark on the fronts, with two oak girders on the fronts, the entire length. Piers to be braced in the best and strongest manner, to be covered with 7-inch covering and 12 inches of mud, and 8 inches of gravel put on, the same as the main bridge, with all necessary belay-posts, and ring-bolts for the convenience

1242

of vessels. The foundations for the drain to be built of oak piles, solid and substantial; and a drawer of the most approved plan, twenty-five feet wide, sufficient for two tracks, with thirty feet opening for vessels, to be put on in the best manner, to run off and on easily; the main bridge to be twenty-six feet wide with two tracks, well and thoroughly laid and put down, the entire length; the railroad company furnishing the iron rails, chains, spikes, and sleepers for the track; the said Emerson furnishing all the other materials and doing all the labor. The bridge to be in every respect, as to workmanship and materials, equal to the Fitchburg Railroad bridge, across Charles river.

The rest of the bridging, about six thousand feet in length, to be twenty-six feet wide, with six spruce piles in a pier, and outside spur-shores where necessary; piers to be about fourteen feet apart, well capped with sufficient track and outside stringers strongly braced, and covered at intervals of two feet with 3-inch spruce plank, extending across the whole width of the bridge; two tracks to be well laid and spiked down, the whole to be done to the satisfaction of the engineer of the company, strong and sufficient for the passage of engines and cars, with speed and safety.

The said Emerson furnishing all materials, and doing all the labor, excepting the iron rails, chains, and spikes, which are to be furnished by the railroad company.

And said draw and bridge are to be made at such elevation above tide as the engineers of the company shall deem proper, and be built on a level grade, except such portions of the same as said engineers may think proper to have constructed on an inclination.

And the said party of the first part, for and in consideration of the foregoing, agree to and with the said Emerson, party of the second part, to pay him for the oak-pile bridge twenty-five dollars for each foot in length of said bridge; for the draw piers and draw the sum of nine thousand dollars ($9,000); for the spruce pile bridge the sum of seven dollars for each foot in length of said spruce bridge; payments to be made by said railroad company to said Emerson, as follows: Between the first and fifth of each month, for all materials delivered during the proceeding month, eighty-five per cent. of their estimated value, and for all labor performed during the proceeding month, seventy-five per cent. of its estimated value, upon the estimate and requisition of the engineer of said railroad company, and the balance upon the completion and acceptance of the whole work.

In witness whereof, we have affixed our hands and seals this twenty-third of December, A. D. 1853.

CHARLES EMERSON. [SEAL.]
WELCOME FARNUM,
EDWARD CRANE, [SEAL.]
Executive Com. of B. and N. Y. C. R. R. Co., duly authorized.

In presence of—E. HAYNES, jr.

The execution of which contract was admitted.

Receipt of Plaintiff to Defendant.

BOSTON, *Nov.* 15, 1854.

Received of H. N. Slater, forty-four hundred dollars, on account of B. and N. Y. Central R. Road.

CHAS. EMERSON.

$4,400.

The signature to which receipt was admitted.

E. B. Ammidown called by Defendant.

Was a director in Boston and New York Central Railroad Company in 1854. In November, 1854; there were negotiations pending for a contract, for a through route from Boston to New York, between the said Boston and New York Central Railroad Company, and the Norwich and Worcester Railroad Company, and the Steamboat Company plying between Norwich and New York. The contract then existing between said Steamboat Company and Norwich and Worcester Railroad Company, with the Boston and Worcester Railroad Company, would expire about December 1st, 1854. It was necessary that said Steamboat and Norwich and Worcester Railroad Companies should make a new contract. They preferred to contract with us instead of with the Boston and Worcester Railroad Company, provided our road could be ready to run by December 1st, 1854. The only part of our road, as to which there was any doubt of completion, was the bridges which plaintiff was making.

The whole matter was talked over in the presence of the plaintiff. We regarded it as of very great importance; I considered the loss of that contract equal to a quarter of a million of dollars, and the plaintiff said half a million. Committees from Norwich and Worcester Railroad and Steamboat Companies came on to make the arrangement, and went over part of the road. Cannot say whether this was before or after the contract of plaintiff and defendant; but I have very little doubt it was before. Defendant offers to prove, that just prior to the signature of the contract, both parties being present, the counsel of the plaintiff told him, that, unless he was sure that he could complete the bridges by December first, he ought not to sign the contract, and could not recover if he did not complete them by December first. But the court refused to admit the same, to which refusal the plaintiff there and then accepted. The defendant offers to prove that, at the time the contract was drawn up, the element of time was talked over by plaintiff and defendant, and that plaintiff assented that time was the essence of the contract; but the court refused to admit the same, to which refusal the defendant then and there excepted.

J. C. Hurd called by Plaintiff.

Was a director in the Boston and New York Central R. R. Co. in 1854. I was a committee, in August, and about the 14th inst. made a contract with Emerson by parole. We were to pay him $17,000,

and secure to him $6,000 of Farnum, Willer's & Holbrook's endorsements. The $6,000 was secured to plaintiff, and a larger sum than $17,000 was paid to him; but cannot say that the $17,000 was paid at the time agreed, but think it was. He engaged, for this, to go on and finish the work; we drew up a contract, but he declined to sign it, giving as his reason that his word was as good as his bond.

The defendant moved the court to rule and instruct the jury, that by the true construction of said contract declared on, the plaintiff would not be entitled to recover without showing that the work was completed, ready for laying down the iron rails for one track by the first day of December, 1854; but the court refused so to instruct the jury, but did instruct them, that the agreement, on the part of the defendant, to give the notes in said agreement mentioned, was not dependent upon the completion of said work, ready for laying down said rails for one track at the time limited by said contract. To which ruling and refusal the said defendant did then and there except.

And the defendant further requested the court to rule and instruct the jury, that if the plaintiff failed to complete said work, ready for laying down said iron rails for one track by the said first day of December, there was thereby a failure of the consideration of said contract, and the plaintiff would not be entitled to recover the amount claimed by him, or any part thereof; but the court refused so to instruct the jury, to which refusal the defendant then and there excepted.

His honor, the judge, having first called upon the defendant to offer evidence, if he saw fit, of any actual damage by him sustained by the non-performance of said work within the time limited by said contract, and the defendant declining to offer any such evidence, and admitting that no such actual damage was claimed by him in this suit, the court thereupon instructed the jury to deduct from any sum they might find for the plaintiff the sum of one dollar, as nominal damage for the said non-performance of plaintiff. To which direction the defendant then and there excepted, and thereupon the jury returned a verdict for the plaintiff, in the words following, to wit:

The jury find, that the defendant did promise, in manner and form as the plaintiff hath declared against him, and assess damages in the sum of ten thousand one hundred and ninety-nine dollars.

GEORGE M. OAKER, *Foreman*.

And inasmuch as matters referred to, and the several instructions of the honorable court so objected to, do not appear by the record of the verdict aforesaid, the counsel on the part of said defendant prayed the honorable court to set their seal to this bill of exceptions, containing the several matters proved and given in evidence, and the rejections, rulings, and directions of his honor the judge thereupon, and the exceptions thereto.

All which, being found to be true, are allowed.

In witness whereof, I have hereunto set my hand and seal.

B. R. CURTIS,
Jus. S. C. U. S. [L. S.]